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Supreme Court, U.S.  
**FILED**

**MAR 20 1987**

JOSEPH F. SPANIOLO, JR.  
CLERK

No.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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**DAVID MORRIS POSNER,**  
*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**  
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**PETITION FOR WRIT OF CERTIORARI**

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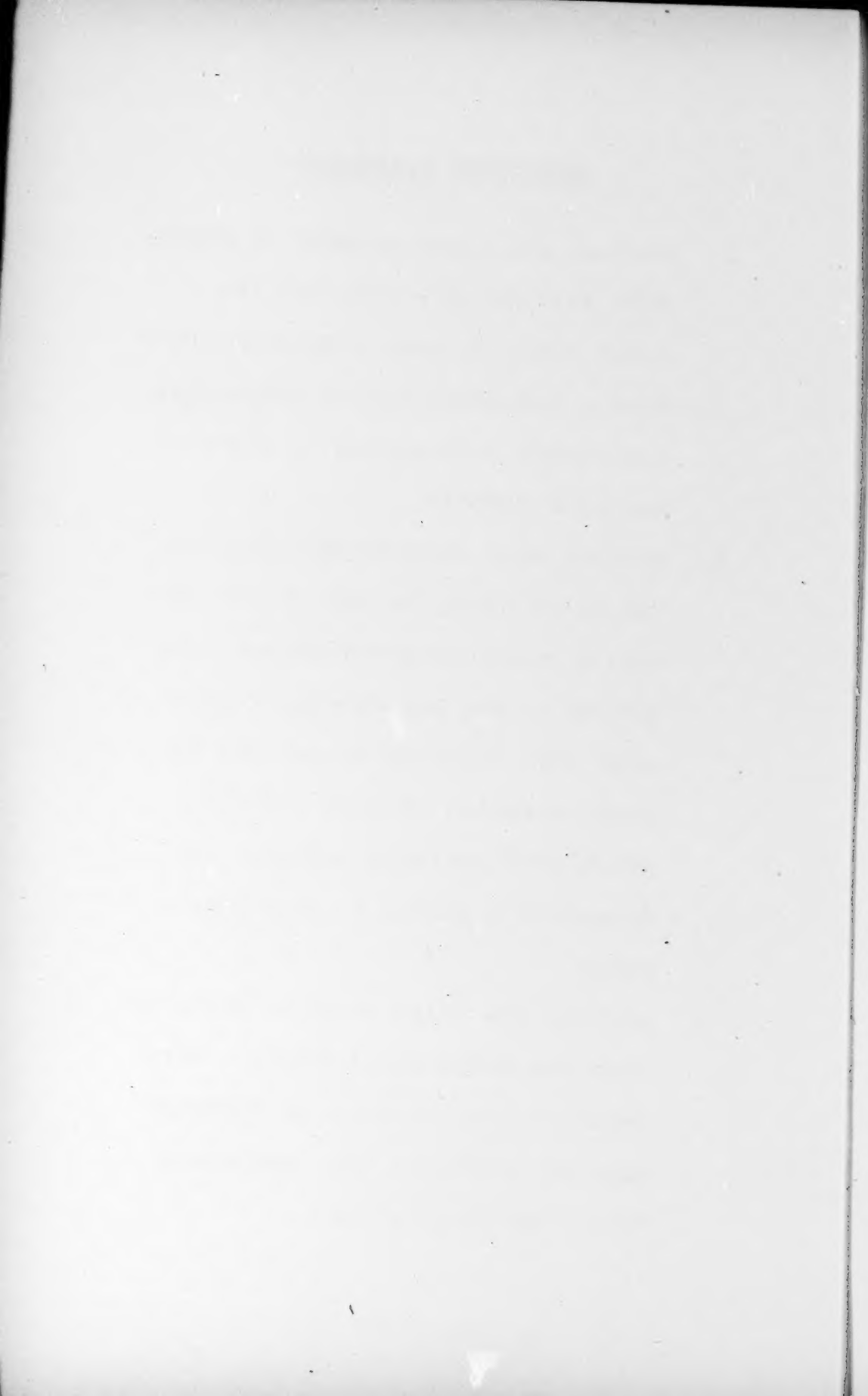
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38170



### QUESTIONS PRESENTED

1. Whether the clear mandate of FRCrP, Rule 32(c)(3)(D), requires the trial court to make a determination when a defendant timely challenges inaccurate information in the presentence report?
2. Whether Rule 32(c)(3)(D) requires the trial court to make a determination concerning challenged information in the presentence report when that information relates to a mixed question of fact and law which substantially affects the defendant's parole eligibility date?
3. Whether the trial court's deviation from the Model Ninth Circuit Jury Instructions relating to presumption of innocence and reasonable doubt was plain error?



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#3.02

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Ninth Circuit

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NO. \_\_\_\_\_

**IN THE  
SUPREME COURT OF THE UNITED STATES**

October Term, 198\_\_\_\_\_

DAVID MORRIS POSNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Petitioner, DAVID MORRIS POSNER,  
petitions this Court for a Writ of  
Certiorari to review the opinion of  
the United States Court of Appeals for  
the Ninth Circuit rendered in this  
action.

### OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is unpublished and attached to Appendix A. The Appellate Court's Order denying the Petition for a Rehearing is also unpublished and attached in Appendix A.

### JURISDICTION

The Opinion of the Appellate Court was entered on November 28, 1986, and affirmed the District Court's action failing to make findings pursuant to Federal Rules of Criminal Procedure, Rule 32(c)(3)(D), regarding inaccurate information in appellant's Presentence Report, and the utilization of allegedly defective jury instructions. A timely Petition for Rehearing was filed by Petitioner and denied on January 20, 1987. The jurisdiction of this

Court is invoked pursuant to 28 USC §1254(1).

**STATUTORY PROVISIONS INVOLVED**

Federal Rules of Criminal Procedure,  
Rule 32(c)(3)(D):

"If the comments of the defendant and his counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission."

**STATEMENT OF THE CASE**

Petitioner was convicted of conspiracy to steal and convert books belonging to the United States Post

Office. The gravamen of this petition relates to the District Judge's failure to make findings pursuant to Federal Rules of Criminal Procedure, Rule 32(c)(3)(D), regarding inaccurate information in the presentence report. The challenged language in the Presentence Report reads:

"Initial investigation by the postal authorities estimated the value of the books in excess of \$2,500. According to the U.S. Attorney's Office, subsequent appraisal of the said merchandise by a book expert estimated its total retail value at \$12,000."

Petitioner claims the value of the books was a mixed question of law and fact requiring a written finding by the trial judge pursuant to Rule 32. In the Presentence Report the prosecution claimed that the value of the stolen books was \$12,000. Petitioner disagreed and challenged the claim

prior to the sentencing by written motion and, during the sentencing orally. Petitioner argued in his motion, entitled Request to Correct Error in Presentence Report, that the "value" of the books was either zero or an amount between \$910 and \$2,800, depending upon which measure of "value" was used. The actual "value" of the books was a factual question. The standard to be used in arriving at the "value" of the books, be it retail value (as the prosecution urged), cost, or replacement cost to the victim (as the defense urged), is a question of law. In deciding the factual question of value, the trial court must implicitly also resolve the legal question of the appropriate measure of value. The Petitioner was sentenced to prison and the "value" of the books will have

a substantial impact on his parole date.

By way of factual background, Petitioner and his mother operated several book stores in the Los Angeles area and frequently purchased books at Post Office auctions.

On July 2, 1982, Petitioner was found by Postal Service security force in the restricted loading area of the Dead Parcel Facility of the Postal Service, Bell, California. On Petitioner's truck were fourteen hampers of books that were the property of the Postal Service. Co-defendant Willie Durham, a Postal Service Supervisor at the Dead Parcel Facility in charge of its day-to-day operations had contacted Petitioner to advise him to pick up this load of books. The Government sought to show that on July 2, 1982,

both Petitioner and Durham illegally conspired and stole auction books valued at more than one hundred dollars which belonged at the time to the United States Postal Service.

The Dead Parcel Bureau in Bell, California, holds parcels of mail matter of undeliverable mail including books that are lost in the mails. (RT Vol. 1, 45) The Postal Service had three procedures by which the public could obtain books from the Dead Parcel Branch: (1) inquiry or claim under Form 1510PS; (2) attending an auction; or, (3) the Publisher's Return Program. Under the Publisher's Return Program, a publisher or distributor of books submits in writing, in quadruplicate, a request for approval by the Postal Service so books they may have lost can be returned to them. One of the

request copies is sent to mail classification in Washington, D.C., one to the Postmaster of the Dead Parcel Branch area, and the original copy would be kept at the Dead Parcel Branch. (RT Vol. 1, 45-47) All requests are routinely approved unless it is known that books listed in the request are objects of dispute.

Approval for the Publisher's Return Program is communicated by stamping the request letter "approved" or by sending a letter indicating approval.

(RT Vol. 1, 48-49) Petitioner's family owns several book stores and is one of the largest West Coast purchasers of books at Postal auctions. However, the Postal Service determined Petitioner was not authorized to receive books under the Publishers Return Program. (RT Vol. 1, 73-74) The defense



presented evidence Petitioner was authorized to receive the books in question under the Publishers Return Program. The jury found otherwise, and Petitioner was sentenced to a year and a day in prison.

**REASONS FOR GRANTING THE WRIT**

**I**

**THE DISTRICT COURT VIOLATED THE REQUIREMENTS OF RULE 32(c) (3) (D)**

Rule 32(c) (3) (D) provides in pertinent part:

"If the . . . defendant. . . allege[s] any factual inaccuracy in the presentence report. . . the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission."

The Court failed to make a finding concerning the allegation of inaccurate factual information and did not make a determination that a finding was unnecessary because the controverted matter would not be taken into account as required by the Rule. After reviewing the presentence report, Petitioner filed a written Rule 32(c) motion objecting to the inaccurate factual information in the presentence report (ER 26). 1/

The Government filed a written opposition (ER 41). Twice during the sentencing hearing counsel for Petitioner reminded the Court of the pending motion to correct the presentence report (RT Vol. 5, 6). Nevertheless,

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1/ "ER" refers to the Excerpt of the Record.

the Court completely failed to make any ruling or any findings concerning the disputed information. The contested factual information related to the amount of the monetary loss suffered by the victim and was relevant, inter alia, if not critical, to the Parole Commission's determination of parole eligibility. The timing of parole is determined, in part, by establishing an "offense severity" for the crime, which is determined by the amount of the monetary loss sustained by the victim. In this case, the "value" of the books. The challenged language in the presentence report reads:

"Initial investigation by the postal authorities estimated the value of the books in excess of \$2,500. According to the U.S. Attorney's Office, subsequent appraisal of the said merchandise by a book expert estimated its total retail value at \$12,000."

Petitioner challenged the claim that the books had a value of \$12,000 and argued that the value of the books was either zero or an amount between \$910 and \$2,800, depending upon which measure of "value" was used. The United States Parole Commission, Rules and Procedures Manual (1985), p. 59 (28 CFR §2.1, et seq.), defines "value of the property" as

'The estimated replacement cost to the victim.'

Petitioner submitted a declaration establishing that there was no replacement cost to the victim (Postal Service) as the United States Postal Service received these books free, by accident of handling. The declaration pointed out that some dead letter materials (magazines) are donated free of charge to the Los Angeles Public

Library. Others are simply auctioned off. In the past, according to the declaration hampers of dead-letter books have been auctioned at a price range of \$65 to \$200 per hamper. Hence the auction value of the books in question ranged from a low of \$910 to a high of \$2,800. Therefore, the defense claimed the \$12,000 evaluation of the books in the presentence report was inaccurate and offered factual information by way of declaration to rebut the presentence report information.

In deciding the factual question of the value of the books as required by Rule 32(c), the trial court was also implicitly required to resolve the legal question of the appropriate measure of value. Should it be retail value (as the prosecution urged), cost,

or replacement cost to the victim (as the defense urged)? The Court left the question unanswered. Petitioner was sentenced to a term of imprisonment and the value of the books will have an impact on his parole eligibility date.

Appellate courts have consistently placed the burden of compliance with Rule 32(c) on the sentencing court. Once false or inaccurate information has been brought to the Court's attention by defendant, the Court must make explicit findings regarding the allegations or make explicit the Court's non-reliance on the disputed information. Mere silence, such as the silence of the sentencing court in the instant case, does not suffice.

United States v. Petitto, 767 F.2d 607 (9th Cir. 1985).

In United States v. Petitto, supra, the Circuit Court stated in no uncertain terms that the conduct by the Court fell below Rule 32 standards:

"In the case, Petitto alleged factual inaccuracies in the report but the trial court made no explicit findings as to each matter controverted. We have previously held that strict compliance with Rule 32(c)(3)(D) is required, and that failure to comply must result in remand. United States v. Travis, 735 F.2d 1129, 1132-1133 (9th Cir. 1984). Travis reached this result even though it appeared from the record that the district court had not in fact considered the controverted matter in sentencing." Petitto, 767 F.2d at 610.

The Petitto Court amplified on the rationale behind requiring explicit findings by the Court:

". . . A clear record as to what information the sentencing court relied upon is crucial to deciding whether the court abused its discretion in not granting an evidentiary hearing." Id., at 610.

As the Court, in United States v.

Travis, supra, explained:

"The purpose of Rule 32(c)(3)(D) is to insure that a record is made as to the resolution of the controverted matters and to insure that the resolution of those controversies comes to the attention of the agencies [i.e., Parole Commission] who utilize the presentence report.

."

(At 1132.)

The record below is silent as to whether or not the sentencing court relied upon the controverted \$12,000 value contained in the presentence report. In the absence of "substantial compliance" with Rule 32(c)(3)(D), the matter must be remanded to the sentencing court. In United States v. Ibarra, 737 F.2d 825 (9th Cir. 1984), the Court did find "substantial compliance" with Rule 32 because the sentencing court expressed, through "rhetorical questions" and "skepticism" apparent non-  
.



reliance on the disputed information. <sup>2/</sup>

In the instant case, the record is devoid of any explicit response -- skeptical or otherwise -- to the valuation issue by the sentencing court.

In United States v. Edwards, 800 F.2d 878 (9th Cir. 1986), the Court underscored that strict compliance with Rule 32(c)(3)(D) is required, and a trial court's failure to make factual findings concerning a controverted matter in the presentence report will result in a remand for the appropriate determination.

Once the factual inaccuracy in the

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<sup>2/</sup> E.g., the Ibarra sentencing court responded on the issue of the agent's conclusion that the defendant bought the rifle to intimidate people, "What difference does it make what she [the agent] concluded? Anyone can conclude anything they want." Id., at 825.

presentence report regarding the value of the books was raised by the defendant, it could not be silently ignored by the sentencing court. Rule 32(c) (3) (D) requires more.

## II

**THE TRIAL COURT'S  
AMALGAMATION OF JURY INSTRUCTIONS  
INCLUDING THE NINTH CIRCUIT MODEL  
JURY INSTRUCTIONS AND STANDARD  
DEVITT & BLACKMAR CRIMINAL JURY  
INSTRUCTIONS RESULTED IN PLAIN  
ERROR.**

The trial court instructed the jury using an amalgamation of Ninth Circuit Model Jury Instructions and standard Devitt & Blackmar Criminal Jury Instructions. These jury instructions, when viewed as a whole, inadequately advised the jury on the law and created plain error.

The District Court's preference for the approach taken in the Ninth Circuit Model Jury Instructions is

clear from the record.

"THE COURT: Well, I want you to look at the 9th Circuit instructions because I prefer those and see what you think about them. You may agree.

\*\*\*

THE COURT: . . . I want you to group the instructions -- all of the instructions in those that nobody objects to and leave those that to which one party or another have objections so I can discuss it. I am also calling your attention to the 9th Circuit instructions which I think are superior, so that you will look at those and see if those are appropriate to submit. One must be on embezzlement."

(RT Vol. 3, 158-159)

The trial court, however, deviated from the Model Ninth Circuit Jury Instructions in the critical area of presumption of innocence and reasonable doubt. In addition, the Court gave an instruction from Devitt & Blackmar on false exculpatory statements, one expressly disapproved by the Ninth

Circuit Committee on Jury Instructions, "Consideration of Particular Evidence," p. 48, Manual of Model Jury Instructions for the Ninth Circuit (1985).

The trial judge gave an instruction regarding reasonable doubt and presumption of innocence patterned on Devitt & Blackmar §11.14. (ER 50-51; RT Vol. 4, 109-110) This instruction does not contain essential language clarifying that a defendant need not prove his innocence. The importance of this phrase is seen in the corresponding Model Ninth Circuit instruction which is "superior" in its clarity on this point.

"3.02 CHARGE AGAINST DEFENDANT  
NOT EVIDENCE, PRESUMPTION OF INNO-  
CENCE, BURDEN OF PROOF.

\*\*\*

The indictment is not evidence.  
The defendant is presumed to be  
innocent and does not have to

testify or present any evidence to prove innocence. The government has the burden of proving every element of the charge beyond a reasonable doubt. If it fails to do so, you must return a not guilty verdict." (ER 49)

Manual of Model Jury Instructions for the Ninth Circuit (1985), p. 31.

Not only did the trial court fail to dispel the jury's belief that a defendant had to prove his innocence, it inadequately instructed that the Government has the burden to prove beyond a reasonable doubt every element of the offense. Ninth Circuit Instruction 3.02 and Devitt & Blackmar §11.15 both describe the Government burden regarding each element; neither instruction was given by the Court.

The trial court mentioned the duty of the Government to prove all elements beyond a reasonable doubt only once regarding the conspiracy count:.

"THE COURT: . . . to establish the crime charged, the Government must prove four elements beyond a reasonable doubt. . ."  
(RT Vol. 4, 118)

Regarding Count II, however, the Court did not mention proof beyond a reasonable doubt at all, but, instead, stated erroneously:

"Four essential elements are required to be proved in order to establish the offenses charged in Count Two in the indictment."  
(RT Vol. 4, 120-121)

The net result of the trial court's hybrid jury instruction was deletion of necessary clarifying instructions regarding the seriousness of the Government's burden of proof as to each element of each offense. A reviewing court must consider the instructions in their entirety to determine whether concepts of presumed innocence, the Government burden of proof and the nature of reasonable doubt are

communicated correctly to a jury.

United States v. Robinson, 564 F.2d  
309, 314 (9th Cir. 1976)

Petitioner was further prejudiced by the trial court's inclusion of the questionable Devitt & Blackmar jury instruction regarding false exculpatory statements by a defendant. (ER 53-54; RT Vol. 4, 112-113) The Ninth Circuit Jury Instruction Committee recommended against this instruction. Accordingly, the Model Instructions do not contain an instruction on this issue but, in its place, a warning:

"The Committee recommends that such an instruction not be given and that, if the evidence permits an adverse inference counsel be permitted to argue the point."  
Manual for Model Instructions for the Ninth Circuit, p. 52. (ER 48)

In fact, Government counsel did argue not only the issue of defendant's false statement, but buttressed his

argument with "The Judge will instruct you concerning the law, concerning statements made which were made by defendants designed to show their real intent but later turned out to be false." (RT Vol. 4, 21)

Such misfocused attention on the defendant as a witness was unnecessary and prejudicial. The trial court had adequately instructed the jury that, as jurors, they could judge the credibility of all the witnesses and the weight their testimony deserved. The additional instruction regarding the false exculpatory statement unfairly singled out defendant's credibility from that of other witnesses.

#### CONCLUSION

It is respectfully submitted this Court should establish a Brightline



rule specifying controverted matters  
in a presentence report which raise  
mixed questions of fact and law must  
be determined by the sentencing court.  
under Rule 32(c)(3)(D).

Respectfully submitted,

RICHARD H. KIRSCHNER,  
A Professional Corporation

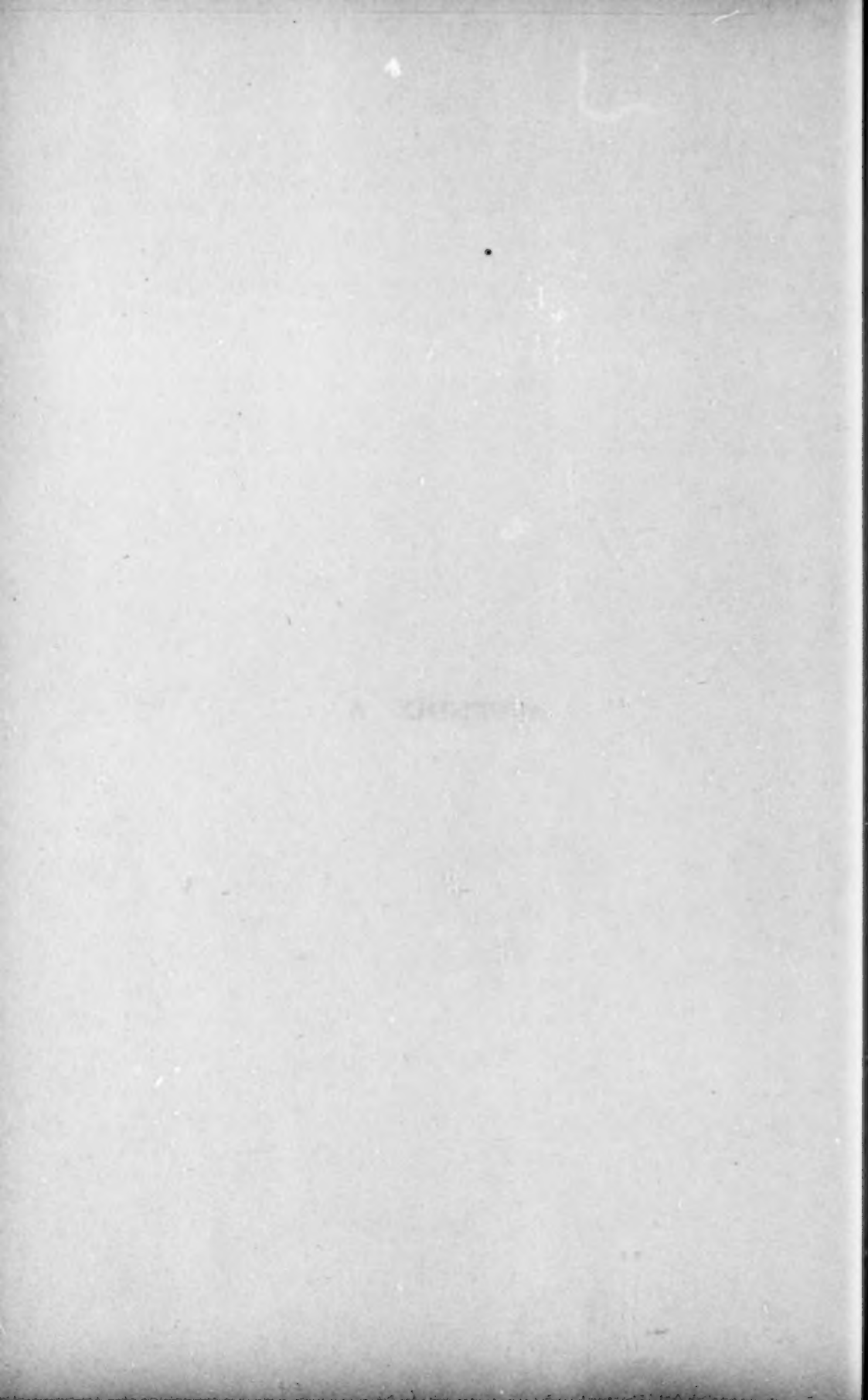
By

  
Richard H. Kirschner

Attorney for Petitioner  
DAVID MORRIS POSNER.



## **APPENDIX A**



NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

Nov.28,1986

Cathy A.  
Catterson,  
Clerk, U.S.  
Court of  
Appeals

UNITED STATES OF AMERICA )

Plaintiff-Appellee, )

vs. )

DAVID MORRIS POSNER, )

Defendant-Appellant. )

No.84-5225

D.C. No.

CR 84-36-

ER

MEMORANDUM\*

Appeal from the United States,  
District Court for the Central District  
of California

Edward Rafeedie, District Judge,  
Presiding

Argued and Submitted November 4, 1986  
Pasadena, California

Before: BROWNING, Chief Judge,  
GOODWIN and FARRIS,  
Circuit Judges

\* This disposition is not appropriate  
for publication and may not be cited  
to or by the courts of this circuit  
except as provided by 9th Cir. R. 21.

Appellant appeals his conviction for conspiracy to steal and convert books belonging to the United States, in violation of 18 U.S.C. § 371, and for theft of government property, in violation of 18 U.S.C. § 641. Appellant argues the district judge failed to make findings, pursuant to Fed. R. Crim. P. 32(c)(3)(D), regarding allegedly inaccurate information in appellant's presentence report. He also argues the jury instructions were defective. We affirm.

The challenged language in the presentence report reads: "Initial investigation by the Postal Authorities estimated the value of the books in \_\_\_\_\_ excess of \$2,500. According to the U.S. Attorney's office, subsequent

appraisal of the said merchandise by a book expert estimated its total retail value at \$12,000."

Appellant admits the challenged language is "literally true." However, Fed. R. Crim. P. 32(c)(3)(D) establishes a procedure by which a defendant may challenge "factual inaccuracy" in a presentence report. Defendant must show the challenged information is "false or unreliable." See United States v. Stewart, 770 F.2d 825, 832 (9th Cir. 1985).

Appellant's real claim is not that the information in the presentence report is false but that the U.S. Parole Commission may make incorrect use of the factually accurate information in the report. This claim does not raise a factual error for the district court to correct under Rule

32(c)(3)(D) but a legal argument properly addressed to the Parole Commission.

In instructing on Count I, the district judge told the jury the government must "prove four elements beyond a reasonable doubt." With respect to Count II, the district judge simply stated: "Four essential elements are required to be proved in order to establish the offenses charged in Count II . . . ." Appellant argues this instruction was defective because the court failed to repeat explicitly that each element of the offense charged in Count II must be proved beyond a reasonable doubt. The two instructions immediately followed each other. Read together they adequately informed the jury that all elements of the offenses charged must



be proved beyond a reasonable doubt.

Appellant challenges the instruction given regarding false exculpatory statements. We approved it in United States v. Boekelman, 594 F.2d 1238, 1240 (9th Cir. 1979).

**AFFIRMED.**



NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

Jan.20,1987

Cathy A.  
Catterson,  
Clerk, U.S.  
Court of  
Appeals.

UNITED STATES OF AMERICA )

Plaintiff-Appellee, )

vs. )

DAVID MORRIS POSNER, )

Defendant-Appellant. )

No.84-5225

D.C. No.

CR 84-36-

ER

ORDER

Before: BROWNING, Chief Judge,  
GOODWIN and FARRIS,  
Circuit Judges

Appellant's petition for rehearing  
is denied.